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Harris Freeman

Western New England College School of Law, hfreeman@law.wne.edu

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SYMPOSIUM—PERSPECTIVES ON RACIAL JUSTICE IN THE ERA OF #BLACKLIVESMATTER

Harris Freeman*

FOREWORD—POLICE MISCONDUCT AND *KIBBE V. CITY OF SPRINGFIELD*

The Law Review's 2017 symposium, "Perspectives on Racial Justice in the Era of #BlackLivesMatter," appropriately opened with a panel that addressed the ongoing challenge of combatting police misconduct, as seen through the lens of *Kibbe v. City of Springfield*,¹ a civil rights case that unfolded in Western Massachusetts and reached the United States Supreme Court thirty years ago. *Kibbe* presented the Court with the question of what the proper standard of liability should be for a municipality accused of a civil rights violation under 42 U.S.C. § 1983 for inadequately training a police officer who violates a person's civil rights.²

The legal issue first presented to the Court in *Kibbe* remains timely. It sits at the root of the Black Lives Matter (BLM) movement's argument that the federal courts have proven incapable of addressing a constant stream of racially driven assaults and killings by police officers against Black individuals.³ BLM's viewpoint continues to resonate, sparking demonstrations and a

* Professor of Legal Research and Writing at Western New England University School of Law. Before joining the faculty in 1999, Professor Freeman clerked for Federal District Judge Michael A. Ponsor from 1993–95, was an associate at Lesser, Newman, Souweine & Nasser, in Northampton, Massachusetts and of-counsel for Attorney Wendy Sibbison. He has been part-time faculty at the Labor Relations and Research Center, University of Massachusetts, teaching labor and employment law since 1999. From 2009–16, Professor Freeman was appointed by Governor Deval Patrick to serve on the Commonwealth Employment Relations Board, the appellate agency body that oversees public sector labor relations in Massachusetts. Professor Freeman's writings appear in the *Employee Rights and Employment Policy Journal* and the *Journal of Labor and Society*. Professor Freeman is a cooperating attorney for the ACLU of Massachusetts and is a founder and co-coordinator of the ACLU's Immigrant Protection Project of Western Massachusetts.

1. See generally *City of Springfield v. Kibbe*, 480 U.S. 257 (1987).

2. *Id.* at 258.

3. See generally Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 W. NEW ENG. L. REV. 431 (2018).

public outcry each time these assaults occur and the legal system fails to hold police and municipal governments legally accountable for the deaths and brutal treatment of Black and Brown victims of state-sponsored violence.⁴ This reality highlights what is widely criticized as a problematic standard of liability governing these civil rights disputes, particularly because there has been a plethora of eyewitness accounts of police misconduct and a stunning number of citizens who have video-recorded these incidents on their cell phones.⁵

The *Kibbe* panel featured the attorneys who litigated *Kibbe*, Terry Nagel and Edward Pikula, both alumni of the Western New England University School of Law (WNEU). Attorney Nagel represented the civil rights claimant, and Attorney Pikula represented the City of Springfield and its police officer defendants. Terry Nagel is currently senior staff counsel for the Committee for Public Counsel Services. Ed Pikula is city solicitor for the City of Springfield. When they argued the case at the U.S. Supreme Court, Terry and Ed were only three to five years out of law school.

The panel concluded with a presentation by Dr. Bridgette Baldwin, a WNEU Law faculty member, who focused on the disturbing social roots of police misconduct in America and the resulting rash of killings of African Americans by police officers that has given rise to BLM.⁶

Kibbe falls within a line of cases that reached the Supreme Court in the wake of the historic civil rights movement of the last century. Civil rights organizations sought to breathe life into 42 U.S.C. § 1983, the post-Civil War statute enacted in 1871 during Reconstruction to provide a remedy for government-sponsored Ku Klux Klan violence against African Americans and to provide a means of enforcing the newly enacted Amendments to the U.S. Constitution that ended slavery and established equal rights for African Americans.⁷ Section 1983 remained dormant and without judicial sanction until 1961 when the Court decided *Monroe v. Pape*,⁸ the historic ruling that

4. *Id.* at 433–37.

5. *Id.* at 439.

6. Dr. Baldwin's symposium contribution can be found in this Issue, Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 W. NEW ENG. L. REV. 431 (2018).

7. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 1 (Oct. 20, 2017) (on file with author).

8. *See generally* *Monroe v. Pape*, 365 U.S. 167 (1961).

Chicago police officers violated the Fourth and Fourteenth Amendments when they engaged in a warrantless invasion of the home of an African American family, purportedly seeking a suspect in a murder investigation. The police forced the parents to stand naked in front of their four children as they ransacked the house.⁹ It turned out the police were mistaken; no one in that house was under suspicion.

This was a watershed moment; *Monroe* was the first time that § 1983 was used to hold police civilly liable for civil rights violations. However, the Supreme Court dismissed the claims in the case brought against the City of Chicago, finding that the City was not a “person” under this Civil Rights Act.¹⁰ The dismissal of the municipal claims significantly curtailed the remedial impact of § 1983, shielding municipal coffers from the reach of successful civil rights litigants.

It took civil rights lawyers and their clients another seventeen years to reverse *Monroe* and persuade the Court that a municipality is a “person” that can be compelled to pay monetary damages for violations of constitutional rights.¹¹ Ed Pikula stressed, however, that *Monell* did not establish an automatic windfall for civil rights litigants every time it was proven that a police officer engaged in a civil rights violation: “the Court said the city is a person but it can’t be held liable just on the basis of *respondeat superior*.”¹² The fact that a city employs the police officers “is not enough, you need to prove that the city itself caused this violation”¹³

Kibbe was a wrongful death case involving a botched police chase of a suspect. In 1981, when Terry Nagle filed *Kibbe* as a § 1983 case in the Massachusetts federal district court in Springfield, three things about the scope of municipal liability under § 1983 were evident on the facts of the case. First, that the City of Springfield had exposure under *Monell* for the allegations of constitutional violations alleged by the plaintiff if it could be proven at trial that the violation resulted from the municipality’s custom or

9. *Id.* at 169.

10. *Id.* at 191.

11. *See generally* *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658 (1978).

12. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 2 (Oct. 20, 2017) (on file with author).

13. *Id.*

policy.¹⁴ Second, as Ed and Terry both pointed out, the allegations of police misconduct were bolstered by evidence that the Springfield police were not properly trained in carrying out police chases of a suspect. Third, that the standard of liability to be imposed on the municipal defendant under 42 U.S.C. § 1983 was definitely not one of *respondeat superior*; but what the correct standard should be—negligence, recklessness of some kind, or something like deliberate indifference—was not a settled question of law.

Terry Nagel was handed a compelling set of facts in *Kibbe*. He used them to present the proposition that a municipality should be liable under the *Monell* standard if it could be proven that the police misconduct at issue was caused by a custom or policy of inadequately training its police officers to engage in a police chase of a suspect.

Indeed, in *Kibbe*, the victim, Clinton Thurston, died from a police-fired bullet to his brain, fired during his attempt to evade arrest in the course of a “low-speed chase, not unlike O.J. Simpson’s, never over 45 miles per hour.”¹⁵ It all began with a 911 call. Thurston had violated a restraining order requiring him to stay away from his girlfriend, Pamela Etter.¹⁶ It was reported that Thurston had abducted Etter and was proceeding by car to Lois Thurston Kibbe’s house; she was Thurston’s sister and became the administrator of Thurston’s estate and the plaintiff in the case.

The ensuing chase involved police cruisers, ineptly executed roadblocks, and ultimately an officer on a motorcycle that fired the fatal shot through Thurston’s car window. As Ed Pikula explained, Thurston drove past an initial roadblock at about twenty-five miles per hour; the officers were brandishing guns and one fired at Thurston’s car.¹⁷ Testimony at trial indicates that police were allowed to use firearms to affect an arrest if an officer reasonably believed that the crime in question included the use of deadly force. Under these rules, Ed Pikula argued that the vehicle Thurston was driving could have been considered a deadly weapon.¹⁸ A second

14. *Monell*, 436 U.S. at 694.

15. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 5 (Oct. 20, 2017) (on file with author).

16. Brief for Respondent at 2, *City of Springfield v. Kibbe*, 480 U.S. 257 (1986) (No. 85-1217), 1986 WL 728319, at *2.

17. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 1 (Oct. 20, 2017) (on file with author).

18. *Id.*

roadblock—with a police vehicle blocking the right-hand lane and an officer standing in the middle of the three other lanes waving his hands to flag down Thurston—was also ineffective at halting Thurston. The City claimed that Thurston swerved toward the officer. At that point, the City argued a shoot to kill approach was warranted.

Next, a motorcycle officer, Theodore Perry, accelerated past the police cruisers and drove alongside the driver's side of Thurston's car. Perry did not hear instructions that motorcycled officers should stay out of the pursuit. After attempts to engage Thurston, when Thurston's vehicle swerved toward Perry, the officer fired shots. The first went through a window of a house; the second struck Thurston in the brain. His car rolled to a stop two houses from his sister's residence.¹⁹ An officer ordered Thurston out of the car; he was unresponsive. Nevertheless, an officer struck Thurston on the head with a flashlight, dragged him out of the car, and handcuffed him face down. Perry failed to report that he shot Thurston and the officers involved in Thurston's transport to the hospital were not told that Thurston was shot.²⁰ He was pronounced dead at the hospital.

Former Springfield mayor and then district court judge, Frank Freedman oversaw the *Kibbe* trial. Only Officer Perry, who shot and killed Thurston, but not the other three officers on trial, was found to have violated Thurston's civil rights. The jury awarded one dollar in compensatory damages and \$500 in punitive damages chargeable to Thurston. But the jury found the City of Springfield violated Thurston's civil rights and awarded his estate \$50,000. The City appealed the verdict.

Nagel's argument from the beginning of the case was that the City was liable for Thurston's death due to inadequate training of its officers under a gross negligence standard.²¹ Nagel persuaded the jury that the City's policy itself did not have to command a civil rights violation, "[W]e were talking about city training that was inadequate and the way that you could tell was that every policeman involved ... operated in a 'keystone cops' kind of approach to the stop, resulting in" Thurston's death.²² "[T]he only way this could

19. *Id.* at 5.

20. *Id.* at 2.

21. *Id.* at 6.

22. *Id.*

have happened was if they weren't trained on how to do stops."²³ Under this theory, Nagel's argument avoided the result required by *Oklahoma City v. Tuttle*, which overturned a \$1.5 million judgment against the city because the jury inferred § 1983 liability based on inadequate training or supervision "solely" from a "single incident" of police misconduct . . . standing alone."²⁴

The First Circuit did not disagree and wrote an extensive analysis to distinguish the factual grounds for the jury's ruling from the facts in *Tuttle*.²⁵ Although it considered *Kibbe* a "close case," the appeals court concluded that it was "unable to say that no jury could find that the City was grossly negligent in failing to train its officers, causing their use of excessive force against Clinton Thurston."²⁶ Relying on this holding, at the Supreme Court Nagel argued gross negligence in police training was evident, not from a single incident of excessive force, but rather from the ineffective police roadblocks and parade of police vehicles chasing Thurston, and the improper use of firearms against an unarmed civilian that amounted to a "Clint Eastwood approach to the use of deadly force."²⁷

The crux of the City's argument to the Supreme Court was based on Pikula's post-trial motion for a directed verdict,²⁸ in which he argued that imposing any variant of a negligence standard to the City was contrary to the holding in *Monell*; "you need recklessness or something like deliberate indifference"²⁹—certainly more than gross

23. *Id.*

24. *Kibbe v. City of Springfield*, 777 F.2d 801, 805 (1st Cir. 1985); *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).

25. *See Kibbe*, 777 F.2d at 805–06.

26. *Id.* at 807. The court further explained:

Here, in an admittedly close case, the evidence consisted principally of: (1) testimony that there was but little guidance for undertaking an automobile chase; (2) testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them; (3) a department rule on the use of firearms which in part required preliminary resort to less severe alternatives, arguably ignored by the officers; (4) another part of the rule which proscribed firing where there was substantial danger to innocent people, arguably violated by two officers; (5) a dispatcher's arguably overzealous announcement on police radio; and (6) evidence of looseness in investigating shootings.

Id. at 804.

27. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 6 (on file with author).

28. *Kibbe*, 777 F.2d at 806.

29. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 3

negligence—to hold a municipality liable under § 1983 for civil rights violations resulting from a failure to properly train police. He also appealed on the ground that the jury instructions “failed to indicate that liability against the City could not be predicated on an isolated incident of negligent training, but must instead be based on ‘a pattern of deliberate supervisory inaction and indifference.’”³⁰

These issues were fully briefed and argued after the Court granted certiorari.³¹ Nagel also presented a procedural argument to the Court that proved dispositive. He contended that certiorari was improvidently granted because the City had failed to object to the jury instructions on gross negligence that it was challenging on appeal.

The *Kibbe* case attracted the attention of leading civil rights and civil liberties organizations. The American Civil Liberties Union (ACLU) of Massachusetts filed an amicus brief supporting Thurston’s estate.³² The ACLU brief, written by Marjorie Hines, later appointed to the Massachusetts Supreme Judicial Court, argued that the proper standard for police misconduct of the sort at issue in the case was gross negligence. Hines also backed Nagel’s argument that the case should be dismissed because Springfield failed to object to the jury instructions it was challenging on further appellate review.³³ The National Association for the Advancement of Colored People (NAACP) also filed an amicus brief authored by then-WNEU Law Professor John Egnal.³⁴ The NAACP argued that the Court should reverse *Monell* and reject the requirement that a § 1983 violation be premised on a finding of a municipal policy or custom; the nation’s oldest civil rights organization further argued that the proper standard for municipal liability should be *respondeat superior*.³⁵

(Oct. 20, 2017) (on file with author).

30. *Kibbe*, 777 F.2d at 809.

31. *See generally* *City of Springfield v. Kibbe*, 475 U.S. 1064 (1986).

32. *See generally* Brief for the American Civil Liberties Union and The Civil Liberties Union of Massachusetts as Amicus Curiae Supporting Respondent, *City of Springfield v. Kibbe*, 480 U.S. 257 (1967) (No. 85-1217), 1985 WL 670242.

33. *Id.* at 7.

34. *See generally* Brief for the National Association for the Advancement of Colored People as Amicus Curiae Supporting Respondent, *City of Springfield v. Kibbe*, 480 U.S. 257 (1967) (No. 85-1217), 1986 WL 728323.

35. The amicus brief filed by the NAACP contended,

[N]either the legislative history of section 1983 nor considerations of policy dictate a rule that requires proof of a government policy or custom in order to establish municipal liability. In this regard, we urge the Court to review its

The First Circuit's ruling upholding the jury verdict for *Kibbe* effectively ended the case. The Court never reached the merits of the negligence issue presented in *Kibbe*. By a five-four vote, the Court agreed with Nagel's argument and found that the City's failure to object at trial to the jury instruction on gross negligence was grounds to dismiss the case, finding that certiorari was improvidently granted.³⁶ However, Justice O'Connor's dissent portended what was to become the standard for municipal liability in § 1983 claims.

Addressing the merits of the City's argument, Justice O'Connor wrote the following in the dissent she authored:

Because of the remote causal connection between omissions in a police training program and affirmative misconduct by individual officers in a particular instance, in my view the "inadequacy" of police training may serve as the basis for § 1983 liability only where the *failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain*.³⁷

The next term, in *Canton v. Harris*, Justice White, mirroring the language of Justice O'Connor's dissent and writing for the majority, held that "[t]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train . . . amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact."³⁸

The majority's decision in *Kibbe* candidly recognized the troubling legal foundation for the Court's holding, noting that the "inquiry" as to "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation" is a "difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*."³⁹ The *Harris* Court's adoption of a deliberate indifference standard to establish municipal liability for failure to properly train a police force did overcome the divisions on the Court; the part of Justice White's opinion that established the deliberate indifference standard

earlier pronouncements on this issue, and adopt the respondeat superior theory as the standard of proof in section 1983 cases.

Id. at 4.

36. *Kibbe*, 480 U.S. at 264.

37. *Id.* at 268–69 (O'Connor dissenting) (emphasis added).

38. *Canton v. Harris*, 489 U.S. 378, 388 (1989).

39. *Id.* at 385–86.

secured nine votes.⁴⁰

Going forward, the Court's standard for municipal liability under § 1983 for a municipality's failure to train and supervise police has provided a consistently strong shield protecting cities and towns from the financial consequences of countless instances of police misconduct. As Terry Nagel explained, the trajectory of the Court's § 1983 jurisprudence—beginning with Justice O'Connor's prescient dissent in *Kibbe*—was to weaken this critical statute whose purpose was to end institutionalized state violence motivated by a racial animus. Three decades after *Kibbe*, Terry Nagel's observation is all too evident in Springfield, one of many cities where, at this time, the pattern of police misconduct decried by the BLM movement appears to be intractable.

The publication of this volume of the *WNE Law Review* occurs as public scrutiny of the Springfield police is underway. There is renewed attention to dozens of civil rights lawsuits, hundreds of citizen complaints and now a U.S. Justice Department investigation is inquiring into what the Boston-based Lawyers Committee for Civil Rights and Economic Justice calls an "absence of any sort of accountability" for the Springfield police force.⁴¹ The alleged misconduct ranges from prisoner beatings and use of racial slurs to roughing up a fellow narcotics officer on a federal task force, violent arrests, and off-duty police assaults on Black and Brown residents of the city. The tenor of the inquiry can be observed in the legal and public scrutiny of a particularly notorious narcotics officer, Gregg Bigda, accused of multiple civil rights violations that were captured on video. This incident led federal Judge Michael A. Ponsor, who presided over a lawsuit involving Bigda, to remark that he had "seen videos of really violent arrests, and this got to me."⁴² As of this writing, the U.S. Justice Department investigation into civil rights abuses by Springfield police officers continues. And, despite some significant settlement agreements for plaintiffs, local civil rights leaders complain that the underlying issue in *Kibbe*—establishing

40. *Id.* Justice O'Connor authored a concurring opinion, signed by Justices Scalia and Kennedy, that also registered dissent on the narrower question of whether a remand of the case was needed. *Id.* at 393–94.

41. Laura Crimaldi & Shelley Murphy, 'I Could Crush Your [expletive] Skull and [expletive] Get Away With It.' *A Deep Look at the Springfield Police*, BOSTON GLOBE (Sept. 1, 2018), <https://www.bostonglobe.com/metro/2018/09/01/springfield-police-facing-civil-rights-probe/m7xG6NUxwFZ2o0gQwPqHVN/story.html>.

42. *Id.*

municipal accountability to deter future misconduct—remains the issue.⁴³

Bridgette Baldwin, the third *Kibbe* panelist, posed the following important question at the opening of the symposium: [W]hat accounts for the violations of civil rights and deaths of Eric Garner, Michael Brown, Tamir Rice, and other Black and Brown citizens victimized by police misconduct?⁴⁴ Professor Baldwin's answer, a trenchant socio-legal analysis, is included in this symposium issue.⁴⁵ Her essay examines the role of implicit bias of state actors—only marginally cognizable under current legal paradigms—and the over-criminalization of communities of color as contributing to the intersection of racism and police misconduct that gave rise to the Black Lives Matter movement.⁴⁶

These insights should be considered in light of the *Kibbe* case and the development of the Supreme Court's § 1983 jurisprudence. As Terry Nagel noted, what "often happens when the Court gives the powerless a tool, they almost immediately begin chipping away at the tool, so that the power becomes less and less."⁴⁷ This symposium issue is dedicated to the issues brought to national prominence by the Black Lives Matter movement and the efforts underway across the globe and around the world to provide the powerless with legal tools to confront the many forms of racial injustice that we continue to face.

43. *Id.*

44. *See generally* Baldwin, *supra* note 3.

45. *Id.* at 442–46.

46. *Id.*

47. Transcript of *Kibbe* Panel with Remarks by Ed Pikula and Terry Nagel at 4 (Oct. 20, 2017) (on file with author).